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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936

Nos. 474 and 475

ANGELO HERNDON,

Appellant,

vs.

J. I. LOWRY, Sheriff of Fulton County,

Appellee.

ON APPEALS FROM THE SUPREME COURT
OF THE STATE OF GEORGIA

BRIEF FOR THE APPELLEE

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IN THE

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OCTOBER TERM, 1936

Nos. 474 and 475

ANGELO HERNDON, *Appellant*

vs.

J. I. LOWRY, SHERIFF, *Appellee*

BRIEF FOR THE APPELLEE

STATEMENT

This is an appeal from a decision of the Supreme Court of Georgia upholding the constitutionality of section 56 of the penal code of Georgia, which provides:

> "Any attempt, by persuasion or otherwise, to induce others to join in any combined resistance to the lawful authority of the State shall constitute an attempt to incite insurrection" (punishable by death, or, if the jury

recommend to mercy, confinement in the penitentiary for five to twenty years.)

The opinion of the Supreme Court of Georgia (R., 100) is reported in 182 Ga. 582.

The decision was rendered in a habeas corpus proceeding instituted by appellant in Fulton County Superior Court. He had been previously convicted in that court of violating the above penal section, and had been sentenced to a minimum of 18 years' imprisonment in the penitentiary under the jury's verdict. He had appealed from this conviction by the method laid down by Georgia law, motion for new trial, and to the overruling of said motion he had appealed by writ of error to the Supreme Court of Georgia, where the conviction was affirmed. See the lengthy opinion of the Supreme Court of Georgia, discussing the many points raised and discussing the sufficiency of the evidence, reported in 178 Ga. 832-868. See also the opinion of the same court rendered on motion for rehearing, in 179 Ga. 597-603.

After exhausting his remedy in the direct appeal, appellant brought his petition for habeas corpus which forms the basis for his present appeal. In this proceeding he contended that the statute under which he was convicted violates the "due process" clause of the Fourteenth Amendment to the U. S. Constitution by unduly restricting freedom of speech and of assembly, and for the additional alleged reason that said statute is too vague and indefinite. (R., 3). He alleged that the statute was unconstitutional in above respects both on its face, as construed by the Supreme Court of Georgia and "as applied" to him by the evidence in his original trial—which evidence he attached as an exhibit to the petition. (R., 11-86). He also alleged that the statute violated the Georgia Constitution on similar grounds.

The judge of Fulton Superior Court hearing the habeas corpus case decided in favor of appellant's contention as to vagueness and indefiniteness of the statute, and held against appellant's contention as to alleged unconstitutionality for undue restriction upon freedom of speech and of assembly.

(R., 89-91). Both sides appealed from this ruling to the Supreme Court of Georgia, which rendered the final opinion above referred to (182 Ga. 582), holding that the statute in question is not unconstitutional in any of the respects contended by Herndon. To this final decision by the Supreme Court of Georgia, appellant has brought this appeal.

SUMMARY OF ARGUMENT

I.

FREEDOM OF SPEECH OR ASSEMBLY NOT UNLAWFULLY ABRIDGED BECAUSE OF ANY INSUFFICIENCY OF EVIDENCE. THE EVIDENCE WAS SUFFICIENT TO ESTABLISH THE CHARGE OF ATTEMPTING TO INCITE INSURRECTION, AND CONVICTION UPON THIS EVIDENCE WAS NOT A DENIAL OF RIGHTS UNDER THE CONSTITUTION.

This division of our brief is an answer to the contentions and argument of appellant under his POINT I-A.

We concede that a State may not, consistently with the due process clause of the Fourteenth Amendment, penalize the advocacy of political, social or economic change to be achieved by lawful means or the organization of a group to further such advocacy.

We also concede that a State may not penalize the specific act of conducting or speaking at a peaceful meeting, with a lawful purpose, regardless of the purposes of the organization calling the meeting.

Herndon was not convicted for any particular speech or for any act of conducting a particular meeting. He was shown to have come to Atlanta as a paid organizer for the Communist Party and was engaged in working up an organization for the party in Atlanta, had actually obtained some members, and had called and conducted some meetings in the interest of furthering the organization. After his arrest he stated (R., 16) that the duties in which he was engaged as such paid organizer were "to call meetings, educate or dis-

seminate information regarding the Communist Party at these meetings, to distribute literature, to secure members for the organization and generally to work up an organization of the Communist Party in Atlanta."

When arrested he had in a box under his arm nine membership books in the Communist Party (R., 47-54), three pads each containing 42 certificates of contribution to Communist Party funds (R., 55-59) and a number of pamphlets and booklets which set forth the aims, plans and purposes of the Communist Party. The membership books set forth the conditions upon which members were accepted and the agreements that the members made upon joining the party, among these being the agreement to "accept the program and statutes of the Communist International and the Communist Party of the U. S. A." and the agreement that the members would subordinate themselves "to all decisions of the comintern and of the party" (the comintern being shown by the literature to be the executive committee of the international party). The authenticity of the literature was proven and was effectually admitted by the defendant.

One of the documents thus found in the defendant's possession was a booklet entitled *"The Communist Position on the Negro Question,"* which explained in detail the meaning of the communist slogan: *"Self-Determination for the Black Belt"* (which slogan appeared in the title lines of the Communist daily newspaper put in evidence and in the numerous other communist certificates and pamphlets). This slogan was declared in above booklet to represent the aim, purpose and demand of the Communist Party in the southern states, and was shown to include the following:

1st—That all land owned by the "southern white landlords" in this black belt be confiscated and turned over to the negroes.

2nd—That the present state boundaries, established for the convenience of the "white master class," be broken up and the state unity of the black belt established.

3rd—That in this black belt the *negroes* be given the complete right of self-determination; *the right to set up their own government,* and the right to separate from the United States if they wish.

This booklet had a map on the outside, showing that this so-called black belt extended through portions of Arkansas, Louisana, Mississippi, Alabama, Florida, Georgia, South Carolina, North Carolina and Virginia.

This booklet also contained resolutions adopted by the Communist International ordering the Communist Party of the U. S. A. to adopt the above plan of "self-determination of the negroes in the black belt" (outlining it in great detail) as a program in the southern states. These resolutions declared that the party members should not limit themselves to propaganda for the "right of self-determination" but should *"organize mass actions such as demonstrations, strikes, tax boycott movements, etc."* The resolutions teemed with such words as "revolution" and "revolutionary," and said that this was a slogan of *"national rebellion."*

The resolutions closed with the declaration that the constant call of the communists to the negro masses must be: *"Revolutionary struggle against the ruling white bourgeoisie, through a fighting alliance with the revolutionary white proletariat."*

Other portions of the booklet, and other documents in the evidence, showed that the American Communist Party was obeying the orders thus given it by the Communist International and was actively trying to incite the negroes in the south to accomplish the above stated aims.

The literature also contained the usual and better known Communist principles and slogans, such as: "Against capitalist terror;" "For the defense of the Soviet Union;" "The Communist Party incorporates the whole body of experience of the proletarian struggle, basing itself upon the revolutionary theory of Marxism."

One of the pamphlets was a publication of the "Young Communist League" containing such incitements as *"Smash the National Guard, the C. M. T. C. and R. O. T. C."*

(All of the documents placed in evidence and above referred to were found in the box under Herndon's arm when he was arrested. (R., 47). Some other documents and bundles of papers were referred to in testimony as being found in his room, but these were not actually introduced in evidence.)

The above is far from complete as a summary. The outline contained under division I of this brief will give a better idea of the evidence.

We submit that the evidence in this case shows that Herndon was actually engaged in attempting to incite an insurrection, as defined and penalized by the Georgia statute, since he was actively engaged in organizing a branch of the Communist Party in Atlanta, and since the "Party" was shown definitely by its authentic literature to advocate the forceful overthrow of the lawful authority of the State by revolution or rebellion, the seizure of all land in the black belt belonging to white people, the abolition of the present state boundaries and the setting up of a new state or nation out of parts of Georgia and other states with sole control by negroes.

Appellant's argument that it is possible to imply only a peaceful meaning to such words as "revolution," "rebellion," "mass action," "tax boycott movements," "violence," "confiscation," "fighting alliance," and "revolutionary," is answered by citing the Fish Committee Report to the 71st Congress, House of Representatives Document 2290, Jan. 17, 1931, "Lenin's Complete Works," and Karl Marx' Manifesto of the Communist Party, all showing that the intent of the communists is not peaceful but forcible overthrow of governments.

Cases which have been cited by appellant in this connection are discussed and distinguished.

II.

GEORGIA'S STATUTE ON "ATTEMPT TO INCITE INSURRECTION," AS CONSTRUED, DOES NOT VIOLATE THE "DUE PROCESS CLAUSE" OF THE FOURTEENTH AMENDMENT BY UNLAWFULLY INFRINGING LIBERTY OF SPEECH OR ASSEMBLY.

Utterances tending to incite the overthrow of organized government by force and violence present a sufficient danger of substantive evil to bring their punishment within the police power of the government.

Section 56 of the Georgia Code is not one making any particular utterance or advocacy criminal, but it penalizes the use of any language and the doing of any acts when used or done under such circumstances as to constitute an actual attempt to incite an insurrection. The imminence of the planned insurrection is not a necessary element.

"Dangerous tendency" is the test applied in many federal and state decisions, in deciding whether the penalizing of certain language amounted to unconstitutional abridgment of freedom of speech.

"Clear and present danger," as a test, has not been followed by the line of federal decisions.

In Whitney v. Calif., 274 U. S. 357, the entire court accepted a rule different from the "clear and present danger" rule for which appellant now contends.

History of the Georgia statute shows it was passed to curb the substantive evil of attempting to incite people to insurrection. Time has not dimmed or varied this evil.

History of the Georgia statute, as given in Appendix to appellant's brief, is not complete or sufficient, and conclusion drawn is not correct. It was not "aimed" specially at insurrection among negroes, as contended, but against whites or negroes. (Historical references given.)

Factual proof as to the legislative intent, if relevant to the claim of unconstitutionality, should have been submitted in

trial court, instead of presenting a disputed issue such as this to the Supreme Court.

"Dangerous tendency" is the rational test to apply, instead of "clear and present danger."

III.

THE GEORGIA STATUTE, AS CONSTRUED, IS SUFFICIENTLY DEFINITE AND CERTAIN.

The statute definitely informs a person that he must not attempt to incite others to combined resistance by force to the lawful authority of the State, when he intends that such force shall come at some time as a direct result of his influence upon those whom he attempts to incite.

Supreme Court has upheld a statute penalizing the printing of an article that tends to encourage or incite the commission of crime or acts of violence, or which tends to encourage or advocate disrespect for law. *Fox v. Washington*, 236 U. S. 273.

Georgia statute is more definite than the California statute which was upheld against contention of unconstitutionality for vagueness in *Whitney v. California*, 274 U. S. 357, 368.

Other state decisions cited have upheld criminal syndicalism statutes against this contention,—some less specific than the California statute.

The Georgia Supreme Court has merely applied to this statute the "rule of reason" which the Supreme Court of the United States applied to the Anti-trust Act of 1890 in *Standard Oil Co. v. U. S.*, 221 U. S. 1, and *Nash v. U. S.*, 229 U. S. 373.

ARGUMENT

I.

FREEDOM OF SPEECH OR OF ASSEMBLY NOT UNLAWFULLY ABRIDGED BECAUSE OF ANY INSUFFICIENCY OF EVIDENCE. THE EVIDENCE WAS SUFFICIENT TO ESTABLISH THE CHARGE OF ATTEMPTING TO INCITE INSURRECTION, AND CONVICTION UPON THIS EVIDENCE WAS NOT A DENIAL OF RIGHTS UNDER THE CONSTITUTION.

In division I-A of his brief, appellant contends and argues at length that "there is no evidence that appellant advocated or attempted to induce others to resort to force or to engage in acts of violence." In this division of our brief we shall therefore answer this contention and point out the evidence establishing that Herndon was actually engaged in work as an organizer for the Communist Party in Atlanta, and that his activity amounted in fact to an attempt to incite insurrection. As a corollary of this, we contend that freedom of speech or of assembly was not unlawfully abridged by the conviction of Herndon upon this evidence.

At the outset we concede that a State may not, consistently with the due process clause of the Fourteenth Amendment, penalize the advocacy of political, social or economic change to be achieved by lawful means or the organization of a group to further such advocacy. This is one of the contentions of appellant which is therefore eliminated from argument.

We also concede that a State may not penalize the specific act of conducting or speaking at a peaceful meeting, with a lawful purpose, regardless of unlawful purposes of the organization calling the meeting.

The case against Herndon does not rest upon acts or conduct which may be explained as being innocuous, as the above. Neither was he convicted for making any particular speech, nor for any act of conducting a particular meeting.

The evidence in this case established the fact that Herndon had come to Atlanta from another state as a paid organizer for the Communist Party, and that he had no other business or interest in view in coming to Atlanta. The evidence did not show the exact time of his arrival, but it appeared that under a different name he had rented a post office box for the reception of mail in Atlanta in September, 1931. He was arrested and indicted in July, 1932. It appeared that during that period of time he had been working up an organization for the Communist Party in Atlanta, had actually obtained some members, and had called and conducted some meetings in the interest of furthering the organization. His admissions to the officers covered this much, and the nine membership books (filled out with the names and data of members) (R., 47-54), together with the record of various "minutes" of meetings found in the documents under his arm (R., 75-78) also showed this organizing activity.

Officer Watson testified: (R., 12). "He did not at first discuss the nature of his work, he did later on; as to the nature or purpose of his work, he said he was sent here by this Communist Party as an organizer for them, representing this Communist Party;" and "He told us they (the documents) were sent to him from headquarters of this Communist Party, in New York."

E. A. Stephens testified: (R., 16). "At that time he stated to me that his duties were, as organizer for the Communist Party, to call meetings, educate or disseminate information regarding the party at these meetings, to distribute literature, to secure members for the Communist Party in Atlanta. . . . He said he had held or attended two meetings, and then later when questioned about where they were held he designated the meeting places of three meetings that he had called and had been held, one of them on Auburn Avenue, I believe, one in the neighborhood of Tiger Flowers' home, as he expressed it, and one on East Cain Street, I think it was . . . said he only have five or six actual members at that time . . . actual members, as he put it; . . . At the time the officer

brought him there he brought that large pasteboard carton down there filled with quite a quantity of literature . . . "

Officer Watson testified: (p. 11). "At the time he unlocked his box and taken the mail out of the box, he had with him at the time a pasteboard box containing books, papers and pamphlets. I would recognize that box if I saw it; this box and its contents is what we taken off of him. I recollect examining the box after the arrest. I identify that box and those pamphlets as the contents of the box at the time of the arrest of this defendant."

The above mentioned pamphlets, contained in the box in the personal possession of Herndon, were the pamphlets and documents introduced in evidence and set forth in the printed Record, p. 47 to 85. See particularly R., 7, reciting that the documents introduced and set forth were in the box in Herndon's personal possession.

Officer Watson also testified that they found a lot of documents in Herndon's room, "newspapers, books, periodicals and such" (R., 12), and Mr. Stephens questioned Herndon about these, as shown by Stephens' testimony as follows: (R., 18).

> "I want to state, further, among the other things he said in talking to me about this quantity of literature here in the suitcase and in the grip, a part of which you will notice has never been taken out of the wrapper—there are several packages like this—in questioning him what this was sent to him for, he stated *for distribution at his meetings;* the same with reference to many of the books that he had in these two receptacles there."

The last named documents and bundles of periodicals found in Herndon's room were not introduced in evidence, but only the *fact* that he had them on hand and that they had been sent to him for distribution at his meetings was placed in testimony.

In Herndon's statement to the jury he denied none of the testimony to which we have referred, and made no statement

or explanation whatsoever with regard to the literature. The testimony above outlined, together with the reasonable inferences therefrom as to the extent and continuity of Herndon's activity in obeying the instructions given to him as an organizer from the Communist headquarters, may be taken as uncontroverted so far as this case is concerned.

ALL MEMBERS MUST FOLLOW INSTRUCTIONS FROM INTERNATIONAL HEADQUARTERS

Among the documents, found in a box under Herndon's arm at the time of his arrest (R., 92), were nine "Membership Books . . . of the Communist Party of the U. S. A.," containing the names of persons "admitted" to the party in Atlanta. These books also contained what purported to be "extracts from the Statutes of the Communist Party of the U. S. A.," some of which were as follows: "A member of the Party can be every person from the age of eighteen up *who accepts the program and statutes of the Communist International and the Communist Party of the U. S. A.,* who becomes a member of a basic organization of the Party, who is active in this organization, who subordinates himself to all decisions of the comintern and of the party, and regularly pays his membership dues. . . . The Communist Party, like all sections of the comintern, is built upon the principle of democratic centralization. These principles are: . . . Regular reporting of the party committees to their constituents. *Acceptance and carrying out of the decisions of the higher party committees* by the lower, strict party discipline, and immediate and exact applications of the decisions of the executive committee of the Communist International and of he Central Committee of the Party. . . . The basis of the party organization is in the nucleus (in factories, mines, shops, etc.) which all party members working in these places must join. The nucleus consists of at least three members. Newly organized nuclei must be endorsed by the leading committee of the Section in which the shop nuclei are organized. . . . The strictest party discipline is the most solemn duty of all party members and all party organizations. The decisions

of the CI and the party convention of the CC and of all leading committees of the party must be promptly carried out. Discussion of question over which there has been differences must not continue after the decision has been made."

In the same membership books we find the following question and answer: "What is the Communist Party? The party is the vanguard of the working class and consists of the best, most class conscious, most active, the most courageous members of that class. It incorporates the whole body of experience of the proletarian struggle, basing itself upon the *revolutionary theory of Marxism* and representing the general and lasting interests of the whole of the working class. The party personifies the unity of proletarian principles, of proletarian will and of proletarian revolutionary action. (From the program of the Communist International). We are the party of the working class. Consequently, nearly the whole of that class (in time of war and civil war, the whole of that class) should work under the guidance of our party, should create the closest contacts with our party (Lenin). He who weakens no matter how little the iron discipline of the party of the proletariat (especially during the period of dictatorship), effectually helps the bourgeoise against the proletariat (Lenin.)" (R., 52).

The authenticity of the literature introduced in evidence was effectually admitted by the defendant, as we have pointed out, and thus no reasonable question can be raised in this case as to the reality of its apparent source, whether it purports to be an expression from the New York headquarters or from the international headquarers of the Communist Party. The defendant himself was admittedly an organizer actively engaged in soliciting and obtaining members for the Communist Party, and therefore the recitals in these "membership books" are brought home to the defendant himself as a part of his solicitation.

PLAN OF THE COMMUNIST PARTY IN THE "BLACK BELT"

One of the documents found on Herndon's person and admitted in evidence was a booklet entitled *"The Communist Position on the Negro Question."* (R., 60-69). On the outside cover was a map of the United States, under which was the following: "Self-Determination for the Black Belt." The map had a dark belt across it, beginning with a portion of Arkansas and Louisiana, and extending generally eastward through the States of Mississippi, Alabama, Florida and Georgia, and thence up the coast through several states, South Carolina, North Carolina and Virginia.

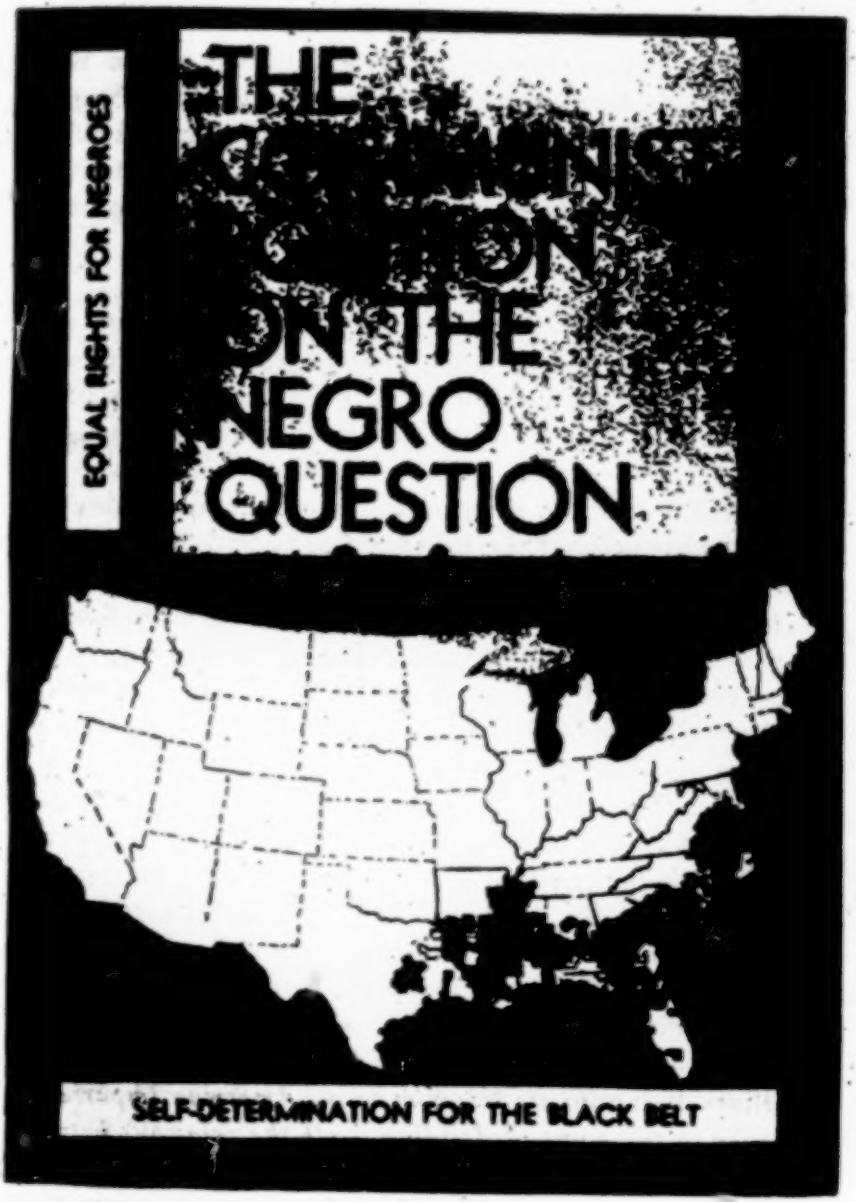
In order to present clearly the import of this document, its display of the slogan: "Self-Determination for the Black Belt," and the map which it portrayed, we reproduce it herewith on opposite page. (See Record, p. 60).

This booklet shows the source of the communist slogan of *"Self-Determination for the Black Belt,"* to-wit: "Resolution of the Communist International on the Negro Question in the United States," adopted October, 1930. (R., 63).

The opening portions of these Communist International resolutions point out how the Communist Party in the United States has been actively trying to win "increasing sympathy among the negro population," and that certain things have been advocated for the benefit of the negroes in the northern states, but that in the southern part of the United States *"the main Communist slogan must be: The Right of Self-Determination of the Negroes in the Black Belt."*

The Resolutions then proceed to point out what that slogan means, as follows: (R., 64-65.)

> "(a) Confiscation of the landed property of the white landowners and capitalists for the benefit of the negro farmers. . . . Without this revolutionary measure, without the agrarian revolution, the right of self-determina-


EQUAL RIGHTS FOR NEGROES
THE
ON THE
NEGRO
QUESTION
SELF-DETERMINATION FOR THE BLACK BELT

tion of the Negro population would be only a Utopia or, at best, would remain only on paper without changing in any way the actual enslavement."

"(b) Establishment of the State Unity of the Black Belt. . . . If the right of self-determination of the Negroes is to be put into force, it is necessary wherever possible to bring together into one governmental unit all districts of the South where the majority of the settled population consists of negroes. . . ."

"(c) Right of Self-Determination. This means complete and unlimited right of the negro majority to exercise governmental authority in the entire territory of the Black Belt, as well as to decide upon the relations between their territory and other nations, particularly the United States. . . . First of all, true right to self-determination means that the negro majority and not the white minority in the entire territory of the administratively united Black Belt exercises the right of administering governmental, legislative, and judicial authority. At the present time all this power is concentrated in the hands of the white bourgeoisie and landlords. It is they who appoint all officials, it is they who dispose of public property, it is they who determine the taxes, it is they who govern and make the laws. Therefore, the *overthrow* of this class rule in the Black Belt is unconditionally necessary in the struggle for the negroes' right to self-determination. This, however, means at the same time the overthrow of the yoke of American imperialism in the Black Belt on which the forces of the local white bourgeoisie depend. Only in this way, only if the negro population of the Black Belt *wins its freedom from American imperialism even to the point of deciding itself the relations between its country and other governments, especially the Unied States*, will it win real and complete self-determination. One should demand from the beginning that *no armed forces of American imperialism should remain on the territory of the Black Belt.*"

AMERICAN COMMUNIST PARTY FOLLOWED ABOVE ORDERS FROM MOSCOW

Upon reading the above revolutionary scheme hatched in the brains of the international leaders of the Communist Party meeting in Moscow, the question naturally arises and demands an immediate answer: Was the American Communist Party, of which Herndon was an "organizer," following the above instructions adopted by the international convention?

The same "black belt" pamphlet sets for the nominating speech of C. A. Hathaway, "delivered at the national nominating convention of the Communist Party proposing James W. Ford of Alabama for vice-president of the United States." (R., 62.) Substantial portions of this speech are set forth in the transcript of this case (R., 61-62), including the following:

> "OUR DEMANDS IN THE SOUTH.
>
> "In the first place, our demand is that the land of the Southern white landlords for years tilled by the Negro tenant farmers, be *confiscated* and turned over to the Negroes. . . .
>
> "Secondly, we propose to break up the present artificial state boundaries established for the convenience of the white master class, and to establish the state unity of the territory known as the 'Black Belt,' where the Negroes constitute the overwhelming majority of the population.
>
> "Thirdly, in this territory, we demand that the Negroes be given the complete right of self-determination, the right to set up their own Government in this territory and the right to separate, if they wish, from the United States.
>
> "Around these demands for the Negroes, as I have outlined them here—with the revolutionary white workers in the very forefront of the struggle—the unity of write workers, small farmers and the Negro masses can and must be established. . . ."

BLACK BELT SLOGAN PROMINENTLY DISPLAYED IN OTHER COMMUNIST LITERATURE

To the above damaging evidence against Herndon and the Communist Party, the brief for the appellant has a remarkable answer. It contends that they are exaggeration. See p. 21 of his brief, arguing that "American political tracts traditionally contain rhetoric and over-statement which the average reader naturally discounts and usually is intended to discount."

We shall therefore point out other evidence showing that the American Communist Party adopted the black-belt program instructed from Moscow.

The evidence showed that the title lines of the communist daily newspaper, known as the "DAILY WORKER," carried six planks of the Communist Party, three on the left and three on the right of the title of the paper, and that the fourth plank was: "Equal rights for the Negroes and *self-determination for the Black Belt.*" (R., 82-A.)

A reproduction of this, as shown by the transcript, is here presented on opposite page.

The copy of this newspaper which was introduced in evidence, being one of the papers found on the person of Herndon when he was arrested, bore date of July 8, 1932, and contained various news articles and editorials, among them being an article issued by "Central Committee, C. P. U. S. A." saying in part as follows: (R., 81.)

> "The Communist Party fights for peace, fights against imperialist war, fights for the defense of the only workers' republic in the world—the Soviet Union. . . .
>
> "The Communist Party is the only party which fights for equal rights for the negro people. It is the only party which fights for the right of the negro people to govern in the 'Black Belt' . . . .
>
> "Every penny you contribute will aid the Communist Party and the Daily Worker bring the program of the

VOTE COMMUNIST FOR

1. Unemployment and Social Insurance at the expense of the state and employers.
2. Against Hoover's wage-cutting policy.
3. Emergency relief for the poor farmers without restrictions by the government and banks; exemption of poor farmers from taxes, and no forced collection of rents or debts.

VOTE COMMUNIST FOR

4. Equal rights for the Negroes and self-determination for the Black Belt.
5. Against capitalist terror; against all forms of suppression of the political rights of workers.
6. Against imperialist war; for the defense of the Chinese people and of the Soviet Union.

> revolutionary working class to every nook and corner of the United States."

It will be noticed that in one of the documents found on Herndon labeled "Minutes of the Section Committee, July 10, 1932" it was recited: (R., 75.)

> "Organize special day for distribution of the 750 copies of the Daily's that we will get for our section."

"Section" is a prominent organization term among the Communists, as shown by each one of the nine membership books. (R., 48 et seq.)

The reference in these minutes of the section committee to "750 copies of the Daily's that we get for our section" undoubtedly meant 750 copies of the Daily Worker, the official "organ" of the Communist Party, U. S. A., according to its own title lines. The jury was certainly authorized to so find, especially in view of the fact that Herndon admitted to the officers that part of his duties as organizer for the Communist Party were "to call meetings, educate or disseminate information regarding the party at these meetings, *to distribute literature,*" etc., (R., 16), and the fact that the officers found newspapers, books and periodicals in Herndon's room which Herndon admitted had been sent to him from the Communist headquarters in New Work, (R., 12), and the fact that some of these newspapers and periodicals "had never been taken out of the wrapper" when found by the officers and carried to the court house (R., 18). Officer Watson's testimony shows that some of these bundles of newspapers found in Herndon's room were "batches" of "The Daily Worker." (R., 21-22). All this authorized the jury to find that Herndon as organizer was engaged, among other things, in distributing copies of the *Daily Worker,* as the minutes of the section committee above quoted indicated.

And with every copy of the *Daily Worker* went its incendiary slogan as carried in its title lines: *"Self Determination for the Black Belt."*

Next we point out that there was found upon Herndon's person three pads (42 certificates each) of *"certificates of contribution"* to Communist Party campaign funds, and that each of these certificates carried on the back thereof a tabulation of the same six Communist planks that were carried at the top of the Daily Worker,—the fourth plank being "Equal rights of the Negroes and self-determination for the Black Belt." (R., 55-57). These certificates had a blank place for Herndon to insert the name of the contributor, which according to the language of the certificate was to be delivered to the contributor. Attached to each "certificate" was a stub, in which Herndon was to write the name of the contributor, address, amount donated, etc. And with every such certificate delivered to the hands of a contributor, the slogan therefore would be carried: "Self-Determination for the Black Belt."

The outside of each of these pads of certificates was in red paper, and again carried the slogan, among others, of "Self-Determination for the Black Belt." (R., 59).

On the red back of each of these pads was also the following:

> "Every dollar collected is a bullet fired into the boss class. The success of this campaign depends upon your efforts. Read and subscribe to the Daily Worker."

OTHER SLOGANS OF THE COMMUNIST PARTY WERE OF INSURRECTIONARY NATURE

We have so far limited our discussion of the communist literature found on Herndon to the portions relating to the communist efforts to stir up the negroes to revolutionary action in the so-called Black Belt. But there were also other planks and slogans of a very insurrectionary nature. Among the planks carried at the top of every issue of the *Daily Worker* was: "(6) Against imperialist war; *for the defense of the Chinese people and of the Soviet Union.*"

Compare this with the slogans found in document No. 16 (R., 71), entitled "An Appeal to Southern Young Workers," setting forth what "the Young Communist League fights for." This included:

"8. *Against bosses' wars! Defend the Soviet Union!*
"9. *Smash the National Guard, the C. M. T. C. and R. O. T. C.!*"

A revealing explanation of the meaning of the above slogans will be found in Document No. 14 (R., 69-70), which was the July, 1932, issue of *The Communist*, a magazine of the "theory and practice of Marxism-Leninism," published monthly by the Communist Party of the U. S. A." The first article, an editorial, contained the following: (R., 70):

> "The capitalist class of the United States finds itself at the present time in the process of 'growing into' a new world war, *into the war against the Soviet Union.* . . . It is this peculiar tactic, followed by world capitalism under the screen of the most intense pacifist maneuvers, that we must concentrate on exposing before the masses in order to bring about a more determined and concrete struggle against the imperialist war and for *the defense of the Soviet Union.*"

And in connection with this, it will be noticed that every one of the communist membership books sets forth as a "communist principle" that everyone who becomes a member of the party must *accept and carry out the decisions of the executive committee of the Communist International.* (See R., 49). And every communist membership book also contains this: (R., 52):

> "We are the Party of the working class. Consequently, nearly the whole of that class (*in time of war and civil war, the whole of that class*) *should work under the guidance of our Party. . . .*"

Thus we see that the Communist Party openly predicts a war between the United States and the Soviet Union, and at the same time flaunts to its members and to all the people it can reach the Communist slogan; "Defend the Soviet Union," and binds all the members it can procure to the solemn agreement that they will "accept and carry out" all decisions of the Communist International organization, and exhorts them

that *specially in time of war and civil war* they should work under the guidance of the Communist Party, instead of under the leadership and guidance of the United States government!

And in order to cripple the United States government before the arrival of the predicted war, they exhort their prospective adherents to "Smash the National Guard, the C. M. T. C. and R. O. T. C." (R. 71).

Simultaneously with this they are appealing to the negroes who live in the so-called Black Belt to rise up and overthrow (R. 66) the existing rule in the Black Belt, establish their own government controlled solely by negroes, abolish the present state boundaries, carve out a new negro republic, secede from the United States if they wish, and "demand from the beginning that no armed forces of American imperialism should remain on the territory of the Black Belt!"

After surveying the above, can anyone doubt that the Communist Party and all its officers and organizers are shown by this evidence to be engaged in attempting to incite an insurrection?

COMMUNIST AIMS COULD NOT BE ACCOMPLISHED BY PEACEFUL MEANS

The brief of appellant, however, still contends that the proven aims and purposes of the Communist Party could be accomplished by peaceful means, that advocacy of these things "did not constitute advocacy of the use of violence against lawful authority." (Pages 23 and 24 of his brief). He says that abolition of the present state boundaries and establishment of the unity of the so-called Black Belt "could be done by constitutional amendment or possibly by compact among the States affected." (Page 23). And he says that even secession of the Black Belt "could be accomplished peacefully unless the opposition resorted to force and so precipitated a conflict!" (Page 20).

This argument is contrary both to logic and to the official pronouncements of the Communist Party. Placing the blame for inevitable bloodshed on the intended victims is as if an

armed burglar should enter your house and say, "Now I do not desire bloodshed. It is you who will be responsible for violence if you resist."

Violence and confiscation are the very essence of Communist plans and purposes, wherever they appear. The court judicially knows from the facts of history that the Communist seizure of power in Russia has been by violence and confiscation. Their official statements show that violence is a part of their plan, as we shall point out.

Even the Communist International edict which first promulgated this doctrine and slogan of "Self-Determination for the Black Belt" (R., 63 to 69), admitted that "The SLOGAN OF RIGHT TO SELF-DETERMINATION IS A REAL SLOGAN OF NATIONAL REBELLION." (R., 67). This admission is found in the following paragraph of the International Communist resolutions to which we have already referred; which is fairly teeming with terms of force and violence. (R. 67):

> "Hereby, every single fundamental demand of the *liberation struggle* of the negroes in the Black Belt is such that—if once thoroughly understood by the negro masses and adopted as their slogan—it will lead them into the struggle for the *overthrow of the power of the ruling bourgeoisie*, which is *impossible without such revolutionary struggle*. One cannot deny that it is just possible for the negro population of the Black Belt to win the right to self-determination during capitalism; but it is perfectly clear and indubitable that this is possible only through *successful revolutionary struggle* for power against the American bourgeoisie, through *wresting* the negroes' right of self-determination from American imperialism. Thus, the slogan of right to self-determination is *a real slogan of NATIONAL REBELLION*, which, to be considered as such, need not be supplemented by proclaiming struggle for the complete separation of the negro zone, at least not at present."

In another part of said Communist International resolutions launching the Black Belt plan, it is said: (R. 66).

> "Even if the situation does not *yet* warrant the raising of the question of *uprising*, one should not limit oneself at present to propaganda for the demand, 'Right to Self-Determination,' but should organize *mass actions, such as demonstrations, strikes, tax boycott movements*, etc."

What is a mass-action tax-boycott movement except a resistance by force against payment of taxes imposed by constituted government?

We see from all the foregoing that the Communist documents which Herndon had upon his person, and which evidently constituted his guide and instruction for his work as organizer in which he was engaged, set forth an unquestioned plan of force and violence against the lawfully constituted government, and that Herndon therefore was an accomplice in this attempt to incite an insurrection.

The evidence makes out a case against the Communist Party as principal in the first degree and against Herndon as principal in the second degree. The principal in the first degree is he who fires the shot (in murder, for example), while the principal in the second degree may fire no shot but is present aiding and abetting in the crime.

For further light on the question raised by appellant as to the construction that should be placed upon the statements in the Communist literature found under Herndon's arm, let us turn to well-known and authentic public documents and historical data. In appellent's brief and the appendix thereto he cites several score of non-judicial citations, including newspapers, histories, legislative reports, semi-official reports, etc. We shall therefore cite the following to show that the "peaceable accomplishment of Communist plans and purposes" (suggested in appellant's brief) is not the proper construction of the Communist advocacies, but that the Communist Party stands for *force and violence* and is actively engaged in *attempting to incite a revolution:*

FISH COMMITTEE REPORT IN 1931 UNBARED THE COMMUNIST ATTEMPTS TO INCITE REVOLUTION

House of Representatives Report No. 2290, 71*st Congress*, known as the *Fish Committee report*, contains ample data showing positively what the Communist Party is trying to do. The report summarizes the situation as follows, on page 15:

> "The Communist Party only uses the election laws to place its candidates on the ballot, in order to conduct open campaigns for their revolutionary principles. It advocates the overthrow of the Government by direct means, through *force and violence*, and despises the evolutionary method of democratic governments. It seeks to destroy our republican form of government, guaranteed by the Constitution, and to set up a dictatorship of the proletariat."

The Report quotes the acceptance speech of W. Z. Foster, Communist candidate for president of the United States, in 1928, as follows:

> "Our party, different from the Socialist party, creates no illusions amongst the workers that they can vote their way to emancipation, that they can capture the ready-made machinery of the State and utilize it for the emancipation of the working class. On the contrary, we must utilize this campaign to carry on widespread and energetic propaganda to teach the workers that the capitalist class would never allow the working class peacefully to take control of the state. That is their strong right arm and they will fight violently to the end to retain it. The working class must *shatter* the capitalist state. It must build a new state, a new government, a workers' and farmers' government, *the soviet government of the United States*. . . ."

The Report quotes the following (on page 15) from the published program of the Communist Party at its 6th world congress at Moscow in 1929:

"The Communists consider it unworthy to dissimulate their opinions or their plans. They proclaim openly that their designs can only be realized *by the violent overthrow of the entire traditional social order.*"

In accordance with this "openness" about the Communist plans, "Candidate W. Z. Foster" came before the Fish Committee and bodly made the following admissions, as set forth on page 11 of the Report:

"*The Chairman:* Do the Communists in this country advocate world revolution?"

"*Mr. Foster:* Yes; the Communists in this country realize that America is connected up with the whole world system, and the capitalist system displays the same characteristics everywhere . . . everywhere it makes for the misery and exploitation of the workers . . . and it must be abolished, not only on an American scale but on a world scale."

"*The Chairman:* So that they do advocate world revolution; and do they advocate revolution in this country?"

"*Mr. Foster:* I have stated that the Communists advocate the abolition of the capitalist system in this country and every other country; that this must develop out of the *sharpening of the class struggle* and the struggle of the workers for bread and butter."

* * *

"*The Chairman:* They are opposed to our republican form of government?"

"*Mr. Foster:* Most assuredly."

"*The Chairman:* And they desire to overthrow it through revolutionary methods?"

"*Mr. Foster:* I would like to read from the program of the Communist International at this point . . . 'The conquest of power by the proletariat *does not mean*

peaceful capturing of ready-made bourgeois state machinery by means of a parliamentary majority. The bourgeoisie resorts to every means of violence and terror to safeguard and strengthen its predatory property and political domination. Like the feudal nobility of the past, the bourgeoisie cannot abandon its historical position to the new class without a desperate and frantic struggle; hence the violence of the bourgeoisie can only be suppressed by the *stern violence of the proletariat.*'"

The above interesting colloquy continues to the point where Mr. Foster admits that the Communists "owe no allegiance" to the flag of the United States, for the reason that they term it a "capitalist flag." He also admits that the Communists of America "look upon the Soviet Union as their country." On page 9 the Fish Report says:

> "The Communists of the United States openly admit their allegiance to the Communist International at Moscow, and glory in the fact that they obey all the orders issued from there immediately and implicitly."

COMMUNISTS' ADVOCACY OF FORCE AND VIOLENCE LONG ADMITTED

The Report points out on page 5 that the *Communist Manifesto,* by Karl Marx, originally written in 1848 and reaffirmed by the Communist Party from time to time since, contains the following:

> "Communists scorn to hide their views and aims. They openly declare that their purpose can only be achieved by the *forcible overthrow* of the whole extant social order. Let the ruling classes tremble at the prospect of a *Communist revolution.*"

And the Fish Report quotes on page 65 the following from a 500-page *Report to the Senate,* by Hon. Charles Evans Hughes, in his capacity as Secretary of State, on Jan. 21, 1924:

> "It will be seen that the question of whether the Communist programs contemplate the use of force and vio-

> lence has been passed upon by every class of tribunal which could pass upon it, namely, Federal and State courts, administrative tribunals and legislative committees of both Federal and State governments, and in every class the result has been in support of the position that *force and violence are inseparable from Communist programs.*"

We have not at hand a copy of the above *Report to the U. S. Senate,* but we respectfully suggest that this Court call for a copy, particularly to procure the list (referred to above) of decisions of "Federal and State courts, administrative tribunals and legislative committees," establishing that "force and violence are inseparable from Communist programs." We presume that some of the court cases referred to are along the following lines:

In People v. Taylor, 187 Cal. 378, 203 P. 85 (1921), the defendant was convicted under two counts of an indictment charging violation of the criminal syndicalism act, and the first count (under which the conviction was affirmed by the California supreme court) charged that the defendant did "knowingly belong to an organization advocating sabotage," etc. The organization involved was the Communist Labor Party, and the finding was therefore that this party advocated sabotage.

A similar finding was made in *People v. Whitney,* 57 Cal. App. 449, 207 P. 698 (1922), which is the case that was carried to the United States Supreme Court and affirmed in *Whitney v. California,* 274 U. S. 357. The organization here involved was the Communist Labor Party of Oakland, "a local branch of the Communist Party of California" (207 P. 698), and one of the findings was that this party and its "affiliated organizations" were organized "to advocate, teach, aid, and abet criminal syndicalism," and that their "purposes and sympathies savored of treason."

(The rulings of *Whitney v. California,* 274 U. S. 357, will be discussed further in Divisions II and III of this brief).

Summarizing the finding in the *Whitney* case, which because of its affirmance by the Supreme Court of the United States becomes of great importance in the present case, Mr. Chief Justice Hughes said, in the recent decision in *DeJonge v. Oregon* (No. 123, decided Jan. 4, 1937):

> "In *Whitney v. California,* 274 U. S. 357, under the California statute relating to criminal syndicalism, the defendant was found guilty of wilfully and deliberately assisting in the forming of an organization for the purpose of carrying on a revolutionary class struggle by criminal methods. The defendant was convicted of participation in what amounted to a conspiracy to commit serious crimes."

In *People v. Lloyd,* 304 Ill. 23, 136 N. E. 505 (1922), it was held that the evidence sufficiently established that the Communist Labor Party advocated overthrow of the government by "force, violence and bloodshed." It was pointed out that the Communist Labor Party "stood by the principles of the Communist International formed at Moscow." See particularly headnotes 34, 35 and 60.

In *Com. v. Lazar,* 103 Pa. Super, 417, 157 A. 701 (1931), it was held that "evidence supported conviction for sedition on ground that language used by defendant advocated *revolution by Communists* as minority party."

In *State v. Boloff,* 138 Ore. 568, 4 P. 2nd, 326 (12), (1931), it was held that "the proof with much cogency indicates that the Communist Party (of the U. S. A.) *taught and advocated the use of violence, crime and sabotage* on proper instrumentalities in the winning of industrial and political ends." This decision gives extracts of the same Communist membership books that were introduced in the Herndon trial, as well as other Communist pronouncements and manifestoes.

In Lenin's Complete Works, Vol. Xviii, Page 361, the following definition of "dictatorship of the proletariat" is given:

"The dictatorship of the proletariat is nothing else than power based upon force and limited by nothing . . . by no kind of law and absolutely no rule."

CASE OF FISKE v. KANSAS DID NOT CONTAIN EVIDENCE THAT I. W. W. ADVOCATED FORCE AND VIOLENCE

Appellant cites the case of *Fiske v. Kansas*, 274 U. S. 380, where it was held that the Kansas criminal syndicalism statute as applied violated the due process clause of the Fourteenth Amendment. But the gist of that decision was that the evidence did not show that the I. W. W. advocated force or violence as a means of accomplishing its announced political and industrial aims. See the following, pages 386-387:

". . . And it is not as if the preamble were shown to have been followed by further statements or declarations indicating that it was intended to mean, and to be understood as advocating, that the ends outlined therein would be accomplished or brought about by violence or other related unlawful acts or methods."

The present case is plainly distinguishable because the documents and declarations of the Communist Party, for which Herndon was proven to be an organizer, teemed with proof that the party advocated force and violence as a means of accomplishing its aims.

Appellant also cites *Stromberg v. California*, 283 U. S. 359. But this case was reversed because the California statute authorized conviction for displaying a red flag or banner "as a sign, symbol or emblem of opposition to organized government," and the Supreme Court held that this clause was capable of being construed to include the "peaceful and orderly opposition to a government as organized and controlled by one political party by those of another political party equally high-minded and patriotic, which did not agree with the one in power" (page 369). And "it might also be construed to include peaceful and orderly opposition to government by legal means and within constitutional limitations." It was

therefore held that this clause was "repugnant to the guaranty of liberty contained in the Fourteenth Amendment."

In the present case, the Georgia statute is subject to no such criticism as above, and neither has it been applied to any conduct which was "peaceful and orderly opposition to government by legal means and within constitutional limitations."

DEJONGE CASE PRESENTED QUESTION VASTLY DIFFERENT FROM PRESENT CASE

Appellant also cites, in several places in Division I-A of his brief, the recent case of *DeJonge v. Oregon*, supra. Apparently he relies largely upon that case for a reversal of the present case. The *DeJonge* case is indeed eminent authority for many of the abstract principles included in the argument of appellant in the present case. But the principles there ruled are not disputed by us in any way. Mr. Chief Justice Hughes called attention, in that case, to the very distinctions upon which we rely:

> "It thus appears that, while defendant (DeJonge) was a member of the Communist Party, he was not indicted for participating in its organization, or for joining it, or for soliciting members or for distributing its literature."

On the other hand, the indictment in the present case charged that Herndon did "attempt to incite insurrection" and did "attempt to induce others to join in combined resistance to the lawful authority of the State of Georgia . . . with intent to defeat and overthrow the lawful authority of the State of Georgia by open force and by violent means and by unlawful acts," and, following the established plan of indictments for attempts, the indictment then set forth in various details *the manner* in which said attempt was committed. Among the details then alleged were (R., 7-10):

> (1) Accused did call and attend certain meetings "the purpose of said meetings and the purpose of said speeches being to *organize*, to establish and to set up a group and combination of persons, white and colored, under the name and style of The Communist Party of

America for the purpose of uniting, combining and conspiring to incite riots, to embarrass and impede the orderly processes of the courts and for the purpose of . . . overthrowing and defeating by force and violence the lawfully constituted authority of the State of Georgia. . . ."

(2) Accused did by speech and by persuasion, solicit persons "to join and to confederate with and to become members of the Communist Party" (with intent as above, etc.)

(3) Accused did introduce and circulate and did cause to be introduced and circulated and did aid and assist in introducing and circulating certain booklets, papers and other writings (with intent as above), "their full contents being of such a nature as that they cannot be copied in full in this indictment," but certain portions and extracts being then set forth in the indictment.

Thus it will be seen that the indictment in the present case was quite the opposite from the indictment in the *DeJonge* case.

Of course the nature of the present case and appeal, being a habeas corpus case brought after the affirmance of the conviction on the first appeal, precludes any argument as to the sufficiency or insufficiency of the indictment in its description of the meetings called by Herndon, or the people solicited, or the literature introduced or circulated. All that was a matter for hearing on demurrer to the indictment.

Herndon filed no demurrer, but filed a "motion to quash" in the trial court. After that was overruled, he was tried and convicted, and the conviction was affirmed by the Supreme Court of Georgia before this habeas corpus was instituted. See *Herndon v. State*, 178 Ga. 832.

The indictment plainly charged that Herndon did various acts as above outlined as part of a conspiracy to organize, establish and set up a group of persons for the purpose of

overthrowing the lawful authority of the State by force and violence, and that the same constituted an attempt to incite insurrection, in violation of the Georgia statute.

As said in the *DeJonge* decision, "the States are entitled to protect themselves from the abuse of the privileges of our institutions through attempted substitution of force and violence in the place of peaceful political action in order to effect revolutionary changes in government." And "these rights may be abused by using speech or press or assembly in order to incite to violence and crime."

II

GEORGIA'S STATUTE ON "ATTEMPT TO INCITE INSURRECTION," AS CONSTRUED, DOES NOT VIOLATE THE "DUE PROCESS CLAUSE" OF THE FOURTEENTH AMENDMENT BY UNLAWFULLY INFRINGING LIBERTY OF SPEECH OR ASSEMBLY.

We come now to a discussion of appellant's contention that the Georgia statute, penal code sec. 56, penalizing "Attempt to Incite Insurrection," as construed by the Supreme Court of Georgia, violates the "due process clause" of the Fourteenth Amendment to the Constitution of the United States.

The construction which appellant contends gives to the Georgia statute the tinge of unconstitutionality is set forth in the following language of the Georgia Supreme Court's decision in the *Herndon* case:

> "The statute means then that any attempt to induce others to come together in any combined resistance to the lawful authority of the State shall constitute an attempt to incite an insurrection and shall be punishable as stated. It is immaterial whether the authority of the State was in danger of being subverted or that an insurrection actually occurred or was impending. . . . " (178 Ga. 854.)

> "Force must have been contemplated, but, as said above, the statute does not include either its occurrence or its imminence as an ingredient of the particular

offense charged. Nor would it be necessary to guilt that the alleged offender should have intended that an insurrection should follow instantly or at any given time, but it would be sufficient that he intended it to happen at any time, as a result of his influence, by those whom he sought to incite. It was the intention of this law to arrest at its incipiency any effort to overthrow the State government, where it takes the form of an actual attempt to incite others to insurrection. . . . " (178 Ga. 855.)

(*On Motion for Rehearing*:) "Force must have been contemplated, but the statute does not include either its occurrence or its imminence as an ingredient of the particular offense charged. Nor would it be necessary to guilt that the alleged offender should have intended that an insurrection should follow instantly or at any given time, but as to this element it would be sufficient if he intended that it should happen *at any time within which he might reasonably expect his influence to continue to be directly operative* in causing such action by those whom he sought to induce. . . ." (179 Ga. 600.)

It will be noted that the Georgia statute is not one making any particular utterance criminal, but it penalizes the use of *any language* when used under such circumstances and with such intent as to constitute an actual attempt to incite an insurrection.

Appellant contends, in effect, that the Constitution of the United States guarantees to him the right to use any language he wishes, even though it be used under such circumstances and with such intent as to constitute an actual attempt to incite an insurrection, unless there is a "clear and present danger" of his succeeding in his attempt to incite an insurrection. And since the Georga statute, as construed by the state supreme court, does not make "probable success" of the insurrectionary attempt an essential ingredient of the offense, appellant contends that the Georgia statute is violative of the federal constitution.

RIGHT OF FREEDOM OF SPEECH NOT UNLAWFULLY ABRIDGED

We could phrase no more forceful language to answer this contention than the following oft quoted words from the decision of the United States Supreme Court in the case of *Gitlow vs. New York*, 268 U. S. 652:

> "That the utterances inciting to the overthrow of organized government by unlawful means present a sufficient danger of substantive evil to bring their punishment within the range of legislative discretion is clear. Such utterances, by their very nature, involve danger to the public peace and to the security of the State. They threaten breaches of the peace and ultimate revolution. ***And the immediate danger is none the less real and substantial because the effect of a given utterance can not be accurately foreseen.*** The state can not reasonably be required to measure the danger from every such utterance in the nice balance of a jeweler's scale.
>
> "A single revolutionary spark may kindle a fire that, smouldering for a time, may burst into a sweeping and destructive conflagration. It can not be said that the State is acting arbitrarily or unreasonably when, in the exercise of its judgment as to the measures necessary to protect the public peace and safety, it seeks to extinguish the spark without waiting until it has enkindled the flame or blazed into the conflagration. *It can not reasonably be required to defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual disturbances of the public peace or imminent and immediate danger of its own destruction;* but it may, in the exercise of its judgment, suppress the threatened danger in its incipiency."

At this point the *Gitlow* decision (p. 669-670) cites the following language from *People v. Lloyd*, 304 Ill. 23, 136 N. E. 505; 512:

> "Manifestly, the legislature has authority to forbid the advocacy of a doctrine designed and intended to

> overthrow the government *without waiting until there is a present and imminent danger of the success of the plan advocated.* If the State were compelled to wait until the apprehended danger became certain, then its right to protect itself would come into being simultaneously with the overthrow of the government, when there would be neither prosecuting officers nor courts for the enforcement of the law."

The case of *People v. Lloyd,* supra, which was cited approvingly in more than one place in the *Gitlow* decision, was a conviction in 1920 of thirty-nine members of the Communist Labor Party under the Illinois statute which made it an offense for any person "openly to advocate by word of mouth or writing the reformation or overthrow by violence or any other unlawful means of the representative form of government now secured to the citizens of the United States and the several states by the constitution of the United States and the constitutions of the several states," etc. The gist of the ruling, insofar as applicable to the *Gitlow* case and to the case now at bar, is:

> (6) "The Legislature has authority to forbid the advocacy of a doctrine designed and intended to overthrow the government, *without waiting until there is a present and imminent danger of the success of the plan advocated.*"

Justice Story's work on the Constitution (5th ed.), § 1880, is cited on page 634 of the *Gitlow* decision. On this subject that eminent authority, in expounding the First Amendment which declares: "Congress shall make no law abridging the freedom of speech or of the press," wrote as follows: (§ 1880)

> "That this amendment was intended to secure to every citizen an absolute right to speak, or write, or print whatever he might please, without any responsibility, public or private therefor, is a supposition too wild to be indulged by any rational man. . . . A man might, out of mere malice and revenge, accuse another

of the most infamous crimes . . . might inflict the most distressing punishments upon the weak, the timid, and the innocent; might prejudice all a man's civil and political, and private rights; and might stir up sedition, rebellion, and treason even against the government itself, in the wantonness of his passions or the corruption of his heart.

"Civil society could not go on under such circumstances. Men would then be obliged to resort to private vengeance to make up for the deficiencies of the law; and assassinations and savage cruelties would be perpetrated with all the frequency belonging to barbarous and brutal communities.

"It is plain, then, that the language of this amendment imports no more than that every man shall have a right to speak, write, and print his opinions upon any subject whatsoever, without any prior restraint, so always that he does not injure any other person in his rights, person, property, or reputation; and so always that he does not thereby disturb the public peace, or attempt to subvert the government."

"DANGEROUS TENDENCY" IS TEST APPLIED IN DECIDING CONSTITUTIONALITY OF STATUTES RESTRICTING FREEDOM OF SPEECH

The *Gitlow case* (page 668) also cites approvingly the case of *State vs. Holm*, 139 Minn, 267, 166 N. W. 181 (2), L. R. A. 1918-C, 304. This decision upholds the constitutionality of a Minnesota statute which made it "unlawful for any person to teach or advocate . . . that the citizen of this state should not aid or assist the United States in prosecuting or carrying on war with the public enemies of the United States," against the contention that it was violative of section 1 of the 14th amendment to the federal constitution. On this point the *Holm* case declares: (p. 183 of 166 N. W.)

"To what extent this amendment takes from the States the power to place legislative restrictions upon the free-

dom of speech and the freedom of the press is still a mooted question; but, conceding that it protects this right from abridgment by the States, the freedom secured thereby is not an unlimited license to speak and to publish whatever one may choose. It is settled that the State may prohibit publications or teachings which are *injurious to society, or which tend to subvert or imperil the government or to impede or hinder it in the performance of its public and governmental duties* without infringing the constitutional provisions which preserve freedom of speech and of the press."

The standard here adopted is *"dangerous tendency."* If the writings or speech have a "dangerous tendency," viewed from the standpoint of governmental and social safety, then the State has a right to penalize such writings and speech without infringing the constitutional right of freedom of speech and press. This same standard was adopted and applied by the Supreme Court of the United States in the following cases in 1919 and 1920, upholding convictions in federal courts of violating the Espionage Act of 1917 against contentions that the right of freedom of speech and press was unconstitutionally abridged:

Debs vs. U. S., 249 U. S. 211.
Abrams vs. U. S., 250 U. S. 616.
Schaefer vs. U. S., 251 U. S. 466.
Pierce vs. U. S., 252 U. S. 239.

"CLEAR AND PRESENT DANGER OF SUCCESS" NOT REQUIRED UNDER SUPREME COURT'S RULINGS

Appellant contends that before a person can be penalized for attempting to incite an insurrection by use of words of incitement, it must be shown that there exists a "clear and present danger of the success" of his plan. And in support of this contention he cites the case of *Schenck vs. United States*, 249 U. S. 47. This was an affirmance of a conviction in a federal court of violating the Espionage Act of 1917, in which the decision said:

> "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Cangress has a right to prevent."

But in a later part of the *Schenck* decision (page 52), Justice Holmes said something which we can just as well point to as supporting the "dangerous tendency" rule instead of the "clear and present danger" rule:

> "If the act (speaking, or circulating a paper), *its tendency and the intent with which it is done,* is the same, we perceive no ground for saying that success alone warrants making the act a crime."

And in the four cases which followed the *Schenck* case within the course of a year and a half (*Debs, Abrams, Schaefer* and *Pierce* cases, supra) the Supreme Court absolutely abandoned all reference to any necessity for "clear and present danger," and affirmed the convictions upon the principle of "*dangerous tendency.*"

For instance, in the *Pierce case* (252 U. S. 239, 243), one of the points which went up for decision was the contention that the judge erred in refusing to sustain the demurrer, one of the grounds of which was (3rd) "that there was a failure to show a *clear and present danger* that the distribution of the pamphlet would bring about the evils that Congress sought to prevent by the enactment of the Espionage Act." As to this contention the majority of the Supreme Court held, seven to two (Justices Holmes and Brandeis dissenting):

> "Whether the statements contained in the pamphlet had a *natural tendency* to produce the forbidden consequences, as alleged, was a question to be determined not upon demurrer, but by the jury at the trial." (Page 244.)

Thus the majority of the court ignored the contention that the state of facts did not present a "clear and present dan-

ger" as unnecessary even to answer, or else held (in effect) that these words only meant "a natural tendency to produce the forbidden consequences."

The *Gitlow* decision (on p. 671) actually summarizes the *Schenck* case as holding that in the case of a general statute (penalizing a substantive evil without specifying the words declared to be unlawful), "the general provisions of the statute may be constitutionally applied to the specific utterance of the defendant if *its natural tendency and probable effect* were to bring about the substantive evil which the legislative body might prevent" (citing *Schenck* and *Debs* cases). Thus the Supreme Court treated the *Schenck* case, when considered in the same picture with the subsequent *Debs* case, as applying the *dangerous tendency* rule, which, we have pointed out above, has been applied in so many other cases that it has become the established rule.

Likewise, in *Abrams vs. United States* (250 U. S. 616), in which five Russians were convicted under the Espionage Act for distributing pamphlets appealing to "workers" to oppose and resist the government in its war activities, the Court held (seven to two) that there was no infringement of the constitutional freedom of speech and press, because (page 624) "the language of these circulars was obviously intended to provoke and to encourage resistance to the United States in the war" and "the defendants, in terms, plainly urged and advocated a resort to a general strike of workers in ammunition factories for the purpose of curtailing the production of ordnance and munitions necessary and essential to the prosecution of the war."

The basis upon which the *Abrams* case was affirmed was the *intent*, as illustrated in the above quotations, disregarding the question whether the case presented any "clear and present danger" of the defendants' plan succeeding.

While Justices Holmes and Brandeis dissented in the *Abrams* case, the dissenting opinion which was written by Mr. Justice Holmes also indicates a departure from the "clear and present danger" rule. For he says (page 628):

> "But as against dangers peculiar to war, as against others, the principle of the right to free speech is always the same. It is only the present danger of immediate evil *or an intent to bring it about* that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned."

This certainly recognized and admitted that there would not always have to be a "present danger of immediate evil" to warrant a legislative curtailment of freedom of speech and press, but that the *intent* of the inflammatory speaker or writer was sufficient basis for punishing him regardless of whether there was in fact a "present danger" of his succeeding. Mr. Justice Holmes continued as follows in the dissenting opinion in the *Abrams* case (page 628):

> " . . . Now nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so. Publishing those opinions *for the very purpose of obstructing, however, might indicate a greater danger, and at any rate would have the quality of an attempt.* So I assume that the second leaflet, if published for the purposes alleged in the fourth count, might be punishable."

IN WHITNEY v. CALIF., ENTIRE COURT ACCEPTED DEPARTURE FROM "CLEAR AND PRESENT DANGER" RULE

While the cases discussed in the last few pages of this brief (*Debs, Abrams, Schaefer.* and *Pierce* cases), were all cases of violating the *Espionage Act,* and therefore involved the principle of resistance to the prosecution of the war, it cannot be said that this fact controlled the trend of the decisions or is responsible for the departure from the "clear and present danger" rule.

The *Gitlow* decision, supra, (268 U. S. 652) was decided in 1925, and the case of *Whitney v. California,* 274 U. S. 357, in 1927. Both of these were State court prosecutions

for violations of State criminal syndicalism statutes, in which the appellants contended that the statutes violated the 14th Amendment to the Constitution of the United States by unduly infringing the right of freedom of speech, assembly, etc.

Both the New York and the California statutes in question were upheld by the Supreme Court as constitutional exercise of police power by the States.

While the *Gitlow* case was affirmed by a divided court, seven to two, Justices Holmes and Brandeis dissenting, the *Whitney* case was affirmed without any dissent. Justices Holmes and Brandeis filed a separate opinion concurring in the result, with slightly different argument and reasoning.

The most noticeable thing about the *Whitney* decision, insofar as a present consideration of it is involved, is the fact that both of the opinions rendered in the case (the main opinion and the special concurrence) indicate the acceptance of a departure from or modification of the "clear and present danger" rule of the old *Schenck* case. The main opinion, filed by Justices Taft, Van Devanter, McReynolds, Butler, Sutherland, Stone and Sanford, declared: (page 371)

> "That the freedom of speech which is secured by the Constitution does not confer an absolute right to speak, without responsibility, whatever one may choose, or an unrestricted and unbridled license giving immunity for every possible use of language and preventing the punishment of those who abuse this freedom; and that a State in the exercise of its police power may punish those who abuse this freedom by *utterances inimical to the public welfare, tending to incite to crime, disturb the public peace, or endanger the foundations of organized government and threaten its overthrow by unlawful means,* is not open to question. *Gitlow v. New York,* 268 U. S. 652, 666-668, and cases cited."

(It will be noticed that the test of constitutionality above applied to statutes abridging the freedom of speech is *"dangerous tendency"*—utterances "tending" to "endanger the foundation of organized government," etc.)

And in the special concurring opinion, written by Mr. Justice Brandeis in the *Whitney* case, and concurred in by Mr. Justice Holmes, the following significant language is used: (page 373).

> " . . . Although the rights of free speech and assembly are fundamental, they are not in their nature absolute. Their exercise is subject to restriction, if the particular restriction proposed is required in order to protect the State from destruction or from serious injury, political, economic or moral. That the necessity which is essential to a valid restriction does not exist unless speech would produce, *or is intended to produce*, a clear and imminent danger of some substantive evil which the State constitutionally may seek to prevent has been settled. See *Schenck v. U. S.*, 249 U. S. 47, 52."

Thus it was definitely stated in this special concurring opinion that if certain speech is used *with intent to bring about a clear and imminent danger to the State* (such as, for example, an intent to bring about the State's overthrow by violent means), then the speech may be penalized by the State.

This language is remarkably close to the language of the Georgia Supreme Court in denying the motion for rehearing in Herndon's case, wherein it was said: (179 Ga. 600)

> "Force must have been contemplated . . . but as to this element it would be sufficient if he intended that it should happen at any time within which he might reasonably expect his influence to continue to be directly operative in causing such action by those whom he sought to induce."

In reading the United States Supreme Court decision in the *Whitney* case (274 U. S. 357), and also the California decision which it affirmed (57 Cal. App. 449, 207 P. 698) we see nothing to indicate that there was any evidence of a "clear and present danger" that the defendant and her associates in the Communist Labor Party might succeed in bringing about the revolution which their platform was shown to

advocate. The California statute that Miss Whitney was convicted of violating provided that "any person who organizes or assists in organizing, or is or knowingly becomes a member of, any organization, society, group or assemblage of persons organized or assembled to advocate, teach or aid and abet criminal syndicalism is guilty of a felony and punishable by imprisonment." (See p. 360 of 274 U. S.)

The evidence against Miss Whitney showed (a) that she joined and participated as a committee officer in a convention held by the Communist Labor Party, and (b) that the platform and avowed principles for which the party stood were revolutionary in nature and advocated violence as a means for the proletariat to overthrow the capitalist government. The case, therefore, is quite plainly a parallel to that of Herndon. The Supreme Court's decision in the *Whitney* case (pages 363 to 365 of 174 U. S.) sets forth quotations from the Communist Labor party's platform and literature, showing a remarkable parallel to some of the evidence adduced in the *Herndon* trial.

The California statute did not limit its application to cases where there was "clear and present danger," nor did the evidence show any "clear and present danger" that the defendant and her associates would succeed in their revolutionary plan.

Indeed, there appears nothing anywhere to indicate any greater likelihood or danger of the communists' success in California than in Georgia.

This shortcoming, if it be such, did not keep the Supreme Court of the United States from affirming the conviction in the Whitney case, against constitutional contentions similar to those in the present case.

Therefore the *Whitney* decision is eminent authority for our position that "clear and present danger" is not an essential element of the constitutional test to be applied to state statutes abridging freedom of speech and assembly.

"DANGEROUS TENDENCY" RULE APPLIED BY U. S. SUPREME COURT IN SUSTAINING MINNESOTA STATUTE

Between the time of the *Debs* decision and the *Gitlow* and *Whitney* decisions, there came up for decision the case of *Gilbert v. Minnesota,* 254 U. S. 325. In this case the question was up for consideration as to whether the Minnesota statute making penal "speaking against enlistment" was an unconstitutional infringement upon the right of freedom of speech. The statute being construed was the same one that the Minnesota Supreme Court had already declared constitutional in the case of *State vs. Holm,* 139 Minn. (supra), which as we have pointed out was cited approvingly in the *Gitlow* decision. In this case, likewise, the United States Supreme Court cited approvingly the *Holm* case. (See page 329.) The Supreme Court held that the Minnesota statute did not unlawfully abridge the right of freedom of speech, and *in so doing made no mention whatever of any "clear and present danger" rule.* The decision pointed out and dwelt considerably (pages 332, 333) upon the fact that the evidence indicated that Gilbert's *intent* was the discouragement of enlistment in the army during war time, but the decision pointed out *no "clear and present danger"* that his words would have any effect of actually obstructing enlistment, but on the other hand seems to have been based upon the fact that the prohibited speech had a "dangerous tendency." This fact is brought out more clearly by inspecting the dissenting opinion of Mr. Justice Brandeis, who expressed the opinion that the statute was unconstitutional because "it abridges freedom of speech and of the press, not in a particular emergency, in order to avert a *clear and present danger,* but under all circumstances. Mr. Justice Holmes did not join in this dissent, but concurred in the result reached by the majority.

HISTORY OF GA. STATUTE SHOWS IT WAS PASSED TO CURB SUBSTANTIVE EVIL OF ATTEMPTING TO INCITE TO INSURRECTION. TIME HAS NOT DIMMED OR VARIED THIS EVIL

Appellant's brief presents the argument that because this statute was passed in 1866 the Legislature of Georgia has not determined "that activities such as those in which Herndon was engaged presented a present danger of substantive evil which the State may prevent." (Page 43 of his brief). And in the summary of their appendix (on page 73) it is contended that the Georgia statute was not "*aimed*" at the sort of conduct alleged against Herndon but was "aimed at quelling possible disorders of the special and unprecedented kind threatened immediately after the Civil War."

We might just as well say: the history of the law of murder shows that it was not *aimed* at the gangster method of "taking a person to ride," for this method of committing murder was not practiced at the time the law came into being, and that for this reason the murder law should not be invoked against these modern innovators!

When the robbery laws were enacted in the newly-created Western states of America, the only type of robbery known was the stage-coach robbery. We might say of this, as appellant's counsel says of Georgia's insurrection law, "the conditions at which it was aimed have disappeared." Yet this fact would hardly prevent the robbery laws from being applied to the automobile bandits of the crowded cities of today, who by their acts bring themselves within the terms of that ancient and honorable law.

We have on the statute books of Georgia, and probably in most other states, an offense known as "carrying concealed weapons." This was passed before machine-guns were in existence. Modern invention produced them later. But if a gangster is arrested with a concealed machine-gun and charged with violating that ancient statute against "carrying concealed weapons," it would hardly lie in his mouth to contend that the Legislature had not determined that the carrying of con-

cealed machine-guns was an evil to be prohibited, since they had come into existence after the enactment of the statute.

Appellant's attempt to argue around the *Gitlow* decision by the contention that the present Georgia statute (sec. 56) was passed in 1866, when the Georgia Legislature could not possibly have had the Communists in mind, will avail him naught, for the Communists of today have brought themselves under the terms of the Georgia statute of 1866 (re-enacted in 1871), and the Legislative finding of 1866 and 1871 that "attempting to incite an insurrection" was a sufficient menace to society to call for an abridgment of freedom of speech in this respect stands as true today as it did then.

FACTUAL "PROOF" AS TO LEGISLATIVE INTENT SHOULD HAVE BEEN SUBMITTED IN TRIAL COURT

In Appendix B of appellant's brief, (adopted as part of his argument on page 42 of his brief) appears what purports to be a "history" of Section 56 of the Georgia law. Extracts are quoted from various private documents and public reports, showing where somebody said certain things at various times and places alluded to. Appellant offers this as "factual proof" of his contention that the Georgia Legislature did not have in mind such conduct as Herndon was engaged in when Section 56 was first passed in 1866, or when it was re-enacted in 1871. (See Ga. Laws, 1871, p. 19, as to re-enactment.)

We do not admit the correctness of this alleged factual proof. We shall point out certain extracts and quotations which we have found in similar documents, indicating that the conclusion drawn by appellant's brief is not entirely correct.

But first we ask: Why should the Supreme Court be burdened with this dispute between appellant and appellee as to the reasons actuating the Georgia Legislature in enacting this statute in 1866 and 1871? The "reasons" of the Legislature for enacting the statute are of course not a matter of judicial

notice. If judicial notice covered the subject, there would be no necessity for the citation of these dozens of reports, letters and other documents in an effort to prove what the Georgia Legislature had in mind in passing this law.

There is a recognized way to present "factual proof" upon an issue such as this. It should be presented in the trial court, where both sides would have ample opportunity to present evidence as to the Legislative intent and as to the conditions that brought forth the statute which is being attacked as unconstitutional. See: *Pacific States Box & Basket Company v. White*, 296 U. S. 176 (11) 185:

> "(11). When legislative exercise of the police power is called in question, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence of that state of facts, and one who assails the classification must carry the burden of showing by a resort to common knowledge or other matters which may be judicially noticed, *or to other legitimate proof*, that the action is arbitrary."

The above is practically a restatement of what was said in *Borden's Farm Products Company v. Baldwin*, 293 U. S. 194, 209. In the Borden case the Supreme Court commented that "the factual basis of appellant's contention is disputed and there are no findings disclosing it." (p. 208). And since in that case evidence had been tendered in the trial court, in the nature of "factual proof" to support the alleged unconstitutionality of the statute, without any findings by the trial court upon said tendered evidence, the Supreme Court remanded the case to the trial court for determination of the factual question presented, it being considered of such importance that it would likely have determined the case.

REPLY TO "APPENDIX B"

While we do not feel that the Supreme Court should be burdened with this disputed factual discussion concerning the intent of the Georgia Legislature in 1866 and 1871 in passing

this statute, we do not wish to let the statements and conclusions of appellant as set forth in his Appendix B go unchallenged.

He declares in this Appendix that "from April, 1865, until the close of the Reconstruction period, Georgians continually expressed fears of slave insurrection, especially at Christmas time, 1865." (See page 69 of his brief). And he refers to this same contention on page 72 and in other places, in summing up his conclusions that the Legislature "aimed" this statute at insurrection among liberated slaves.

While we do not doubt that this fear existed, in some parts, there is also evidence that there was considerable fear on the part of governmental authorities that the *white people themselves* would break out in renewed civil war, and this statute was aimed just as much against them as against the negroes.

See Vol. I, *Doc. History of Reconstruction (Fleming)*, page 59, giving extracts from *Report of Joint Committee on Reconstruction*, 39th Congress, quoting General Grierson as follows:

> "I believe that there is an organization existing now throughout the South for the renewal of the rebellion. Many circumstances or things which have occurred since the surrender make me believe so." (1865.)

Appellant cites this congressional committee report and this historical work, on page 69 of his brief. The same historical work, on page 59, quotes the *Carl Schurz report to President Johnson* (1865) as reciting that there were then four classes of people in the South, one class consisting of "the incorrigibles, who still indulge in the swagger which was so customary before and during the war, and still hope for a time when the Southern Confederacy will achieve its independence."

Another well known work, *Reconstruction in Georgia*, by Mildred Thompson, instructor of history at Vassar College (Columbia Univ. Press) on page 163, summarizes the *Carl*

Schurz Report to President Johnson as expressing "omens of recurring rebellion and re-enslavement." On page 165, this book points out that "the basis on which Congress acted in enforcing new reconstruction upon the Southern States in 1865 was that they were still in a condition of war." The author then declares that there was in fact no real danger of any new rebellion in Georgia, though there was in some other States.

In this setting then (perhaps combined with appellant's reported rumor of insurrection among the newly liberated slaves) the Georgia Legislature passed the present insurrection statute in 1866.

Coulter's *Short History of Georgia* points out, on page 343, that the law which was passed in 1866 providing that "anyone attempting to incite combined resistance through violence against the State should suffer death" was an expression by the State of a willingness to support and maintain the newly constituted authority within the State. Coulter here recites that by this and other laws passed in 1866 "Georgia felt that she was showing full loyalty to the Union and proper respect to her conquerors, without heaping disgrace upon herself by abandoning the memories of her past heroism."

It is also worthy of note in this connection that Georgia reaffirmed this statute by amending it in December, 1871, specifically making the punishment clause apply to "Attempts to incite insurrection," after the Supreme Court of Georgia had held in *Gibson v. State*, 38 Ga. 571, that the penalty clause was defective. See Acts 1871, page 19.

Thus we see that this statute expresses a legislative finding in 1866 (and reaffirmed in 1871) that attempting to incite people to combined resistance to the lawful authority of the State constituted a sufficient substantive evil to call for an abridgment of freedom of speech in this regard.

It makes no difference whether the Legislature particularly feared an insurrection by white people or an insurrection

by negroes. The danger to the State would be just as real, whether the insurrectionists were white or black.

This legislative inquiry and finding made in 1866 and reaffirmed in 1871 is just as true today as it was then. Time has not dimmed its value as a legislative enactment.

There is a remarkable parallel between the recent attempts of the Communist party to incite the negroes to seize the land of all white people in the "black belt" and to set up an independent negro nation there, and the attempts which appellant declares in his brief were being made in 1866 to incite the newly liberated slaves to insurrection.

Calling a thing "Communism" today doesn't make it any different from the incitements of 1866, if in fact it is similar.

SIZE OF COMMUNIST VOTE IMMATERIAL, BALLOT ACTIVITY BEING MERELY A CAMOUFLAGE TO CLOAK REVOLUTIONARY INCITEMENTS

On page 43 of his brief, appellant asks the Supreme Court to take judicial cognizance of some statistics which he presents on the size of the Communist vote in Georgia. From these figures which he offers he asks the Court to deduce the conclusion that "there was no clear and present danger to the authority of the State arising from petitioner's activities or those of others."

In reply, we ask the Supreme Court to take judicial cognizance of the findings of the *FISH COMMITTEE* of Congress, as set forth in *House of Representatives Report No.* 2290, 71*st Congress, page* 15,—

> "It is impossible to state, with any exactness, the number of communists and active sympathizers there are in the United States. Estimates by the various witnesses have ranged from 50,000 to 2,000,000. It is the consensus of the witnesses that 70 per cent of the Communists in this country are aliens and, therefore, can not vote. The record also shows that there were over 100,000 *votes* cast for the various Communist state-wide

> candidates in 18 States. . . . Based on this data, therefore, it is the belief of the committee that there are probably 500,000 or 600,000 Communists and active sympathizers in the United States. . . . The sworn daily circulation of Communist newspapers of 262,000 also clearly indicates that the number of Communists and active sympathizers is not less than a half million, and probably more . . . "

And as pointed out previously in this brief, in Division I of the argument, the *Fish Committee* also found and reported to Congress that "the Communist Party only uses the election laws to place its candidates on the ballot in order to conduct open campaigns for their revolutionary principles."

"DANGEROUS TENDENCY" THE RATIONAL TEST, INSTEAD OF "CLEAR AND PRESENT DANGER"

In closing our argument under this division of our brief, we ask the Court to consider the question: *When does a danger become "clear and present?"* With reference to murder, would it be (1) when the ax is poised in the air and about to fall upon an unsuspecting victim, or (2) when the potential murderer gets the weapon and holds it behind his back with intent to use it when the opportunity unfolds, or (3) when a group of conspirators gather behind the barn and plot and plan an attack upon the master of the house?

Would the expression, "clear and present danger" apply to the second and third instances above? Who can answer that question with authority?

It can be argued that No. 2 does not present a case of "clear and present danger" because the potential murderer may change his mind before the opportunity to use the weapon unfolds. And it can be argued that No. 3 does not present a case of "clear and present danger" because the conspirators might decide not to make the attack that day but to put it off until another more opportune day.

It might be provable that the "actual danger" is very great in any of the above instances, even though opinions might

widely differ as to whether the danger were a "present danger" or not.

If "clear and present danger" is made an essential element of the constitutional test to be applied before the law may restrain conspirators against the government, then how shall it be decided whether the danger is "clear and present" or not?

The courts of the land would be called upon from time to time to say what constitutes a clear and present danger, and eventually it would reach the highest court in the land, which is the Court to which this brief is addressed.

Will the Court say that "clear and present danger" to the government would exist only when a mob is surging through the street, threatening to shoot down the officials of the government they wish to overthrow?

Suppose the Court answers: "No, the State need not wait till then, but it may consider the danger clear and present when anyone is speaking to a crowd urging them to go to the halls of government and kill or throw out the established officials." Then, when revolutionary speakers and writers advocate force and violence and address incendiary incitements to an impatient and dissatisfied mob, but accompany their words with the qualification, "now don't do it yet—prepare and make ready for the day, but wait until we give you the word to begin," *the hands of law enforcement officers would be tied!* They would have to wait until the danger became "clear and present," and when that happened it would be too late to prevent bloodshed. In the words of the *Lloyd* case *(304 Ill. 23)*, quoted in the *Gitlow* decision, *(268 U. S. 652, 669-670)*,

> "If the State were compelled to wait until the apprehended danger became certain, then its right to protect itself would come into being simultaneously with the overthrow of the government, when there would be neither prosecuting officers nor courts for the enforcement of the law."

The rational test is "dangerous tendency," which has been so often expressed and applied, as pointed out previously in this brief. And applying this test, there will be no doubt of the outcome of the present case. For the *Whitney* decision (274 U. S. 357, on page 372) pointed out that the organizing and banding together of people for such avowed purposes as are advocated by the Communist Party constitutes a "great danger" which authorizes an abridgment of freedom of speech under the police power of the States. The decision says:

> "That such united and joint action involves even greater danger to the public peace and security than the isolated utterances and acts of individuals, is clear. We cannot hold that, as here applied, the act is an unreasonable or arbitrary exercise of the police power of the state, unwarrantably infringing any right of free speech, assembly or association, or that those persons are protected from punishment by the due process clause who abuse such rights by joining and furthering an organization thus menacing the peace and welfare of the state."

III

THE GEORGIA STATUTE, AS CONSTRUED, IS SUFFICIENTLY DEFINITE AND CERTAIN.

Appellant contends that the Georgia statute under which this conviction took place, as construed by the Supreme Court of Georgia, violates the due process clause of the Fourteenth Amendment because of alleged vagueness and uncertainty.

In construing this statute the Georgia Supreme Court held that in order to be guilty of "attempting to incite insurrection" a person must attempt to induce others to join in combined resistance to the lawful authority of the State, and that in so doing *he must intend that force be used.* In further explanation, as to *when* the force must be intended to ensue, the court said:

> "Force must have been contemplated, but the statute does not include either its occurrence or its imminence as an ingredient of the particular offense charged. Nor would it be necessary to guilt that the alleged offender should have intended that an insurrection should follow instantly or at any given time, but as to this element it would be sufficient if he intended that it should happen at any time within which he might reasonably expect his influence to continue to be directly operative in causing such action by those whom he sought to induce."

This is not vague or indefinite. The statute, as stated and construed, definitely informs a person that he must not attempt to incite others to combined resistance by force to the lawful authority of the State when he intends that such force shall come at some time as a direct result of his influence upon those whom he attempts to incite. Thus *intent to bring about force* as a direct result of his incitement is declared to be a necessary element of the offense.

The statute of the State of Washington, considered and held constitutional in *Fox v. Washington,* 236 U. S. 273, was analogous in many respects to the statute now up for consideration, though the evil there dealt with and penalized did not involve "forceful resistance to the lawful authority of the state" but only "disobedience of law" and "disrespect for law." The Washington statute provided:

> "Every person who shall wilfully print, publish, edit, issue, or knowingly circulate, sell, distribute or display any book, paper, document, or written or printed matter, in any form, advocating, encouraging or *inciting,* or having a *tendency* to encourage or incite the commission of any crime, breach of the peace, or act of violence, or which shall *tend to encourage or advocate disrespect for law* or for any court or courts of justice, shall be guilty of a gross misdemeanor."

This statute was attacked, *by demurrer,* as being unconstitutional, and upon conviction Fox appealed to the Supreme

Court of Washington, where it was held that the statute was not violative of the Fourteenth Amendment, that it did not unlawfully abridge freedom of speech, and that it was not void for uncertainty. (See page 276 of 236 U. S.). The decision of the United States Supreme Court, written by Mr. Justice Holmes, intimates that the statute would have been unconstitutional if it had been construed "to prevent publications merely because they tend to produce unfavorable *opinions* of a particular statute or of law in general," but (quoting Mr. Justice Holmes):

> "We understand the state court by implication, at least, to have read the statute as confined to encouraging an actual breach of law. Therefore the argument that this act is both an unjustifiable restriction of liberty and *too vague* for a criminal law must fail."

The headnote summarizes the decision as follows:

> "A statute which . . . makes criminal the editing of printed matter tending to encourage and advocate disrespect for law, cannot be said to violate U. S. Const., 14th Amend., as being an unjustifiable restriction of liberty, and too indefinite for a criminal statute, where the highest state court, by implication at least, reads the statute as confined to encouraging an actual breach of the law, and in the case at bar has merely construed it as embracing an article encouraging and inciting a persistence in what would be a breach of the state laws against indecent exposure."

(It will be noted that this decision is relevant also to the preceding division of this brief. There is no mention of any "clear and present danger" that the incitement would be acted upon by the persons encouraged by the document. The decision upheld the statute because it penalized the publishing of articles *encouraging people to commit actual violations of law*. And the law violations involved were not matters that contained any danger of overthrow of the government or forceful resistance to it.)

The decision of the *Fox* case in the Washington supreme court (71 Wash. 185), cited only one case on the question of alleged vagueness of the statute, to-wit: *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86, which held:

> "6. Due process of law is not denied a corporation convicted of violating the Texas anti-trust laws of May 25, 1899, and Mar. 31, 1903, because the legislation permits and the trial court charged that there may be a conviction not only for acts which accomplish the prohibited result, but also for those which *'tend'* or are *'reasonably calculated'* to bring about such result."

"RULE OF REASON" HAS BEEN APPLIED BY THIS COURT TO QUALIFY PENAL STATUTE

In *Standard Oil Co. v. U. S.* 221 U. S. 1, the Supreme Court of the United States was construing the Anti-trust Act of 1890, which provided as follows:

> "Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in (#) restraint of trade or commerce, among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract, or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor. . . . " (P. 49 of 221 U. S.)

At the point marked: (#) in the above Act of Congress, the Supreme Court of the United States "by construction" inserted the word: *"unreasonable,"* so that the statute was converted into one which penalized the making of any contract, or combination, etc., *in unreasonable restraint of trade.* See the portion of the opinion extending from p. 49 to p. 62, and also the following headnote:

> "The Anti-trust Act of July 2, 1890, c. 647, 26 Stat. 209, should be construed *in the light of reason;* and, as so construed, it prohibits all contracts and combinations which amount to an *unreasonable or undue restraint of trade* in interstate commerce."

Now who would decide whether a contract which was somewhat in restraint of trade was in *unreasonable* restraint of trade? Manifestly that would be decided by the Court or jury, according to the facts and circumstances of each case as it might be presented in court.

One set of men might hold that a certain contract or combination tending somewhat to restrain trade was in *unreasonable* restraint of trade, and another set of men might decide to the contrary upon the same state of facts.

And it might be argued that a prospective defendant could not tell beforehand whether a contract which he was about to sign would be in *unreasonable* restraint of trade or not, and therefore he would not know whether he was about to commit a crime or not!

(This would be similar to the argument of appellant that under the rule of reason applied by the Georgia Supreme Court to the insurrection statute he would not know beforehand whether his incitement would amount to a violation because he could not tell beforehand what view a jury might take of the element of "reasonableness.")

These considerations did not prevent the Supreme Court of the United States from announcing and applying the "rule of reason" in the above decision construing the Anti-trust Act.

Appellant may seek to answer this argument by saying: The Supreme Court of the United States did not *discuss* the question of vagueness and uncertainty in the *Standard Oil* case, and therefore they probably did not consider that question — and besides, that was a civil proceeding and not a criminal case.

NASH CASE APPLIED THE ANTI-TRUST ACT IN CRIMINAL LAW, AND HELD IT NOT TOO VAGUE OR INDEFINITE

The complete answer to these arguments will be found in the following case, which was rendered by the Supreme Court

a few years after the *Standard Oil* case, and considered the contention of alleged vagueness and uncertainty of the statute in a case of *criminal conviction* under the same Anti-trust Act:

Nash v. U. S., 229 U. S. 373, 57 L. ed. 1232.

Nash was convicted in the U. S. district court for the Southern District of Georgia for violating (with others) the Anti-trust Act of 1890. We see from the recitals on p. 1233 of 57 L. ed., that counsel for Nash presented the following *contention* to the Supreme Court, and backed it up with argument and citation:

> "The law is bad as a penal statute, because it is not sufficiently definite and explicit to advise parties what they may and may not do under the law."

In order to show that the exact point, and even the exact arguments, involved in the present case were presented to the Supreme Court in the *Nash* case, we wish to give at some length here the discussion of this phase of the case by Mr. Justice Holmes:

> "The objection to the criminal operation of the statute is thought to be warranted by *Standard Oil Co. v. U. S.*, 221 U. S. 1 . . . and *U. S. v. American Tobacco Co.*, 221 U. S. 106. . . . Those cases may be taken to have established that only such contracts and combinations are within the act as, by reason of intent or the inherent nature of the contemplated acts, prejudice the public interests by *unduly* restricting competition or *unduly* obstructing the course of trade. 221 U. S. 179. And thereupon it is said that the crime thus defined by the statute contains in its definition an element of degree as to which estimates may differ, with the result that a man might find himself in prison because his honest judgment did not anticipate that of a jury of less competent men. The kindred proposition that 'the criminality of an act cannot depend upon whether a jury may think it

reasonable or unreasonable; . . . There must be some definiteness and certainty,' is cited from the late Mr. Justice Brewer, sitting in the circuit court. *Tozer v. U. S.*, 4 Inters. Com. Rep. 245, 52 Fed. 917, 919.

"But, apart from the common law as to the restraint of trade thus taken up by the statute, *the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree.* If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death. *'An act causing death may be murder, manslaughter, or misadventure, according to the degree of danger attending it' by common experience in the circumstances known to the actor.* 'The very meaning of the fiction of implied malice in such cases at common law was, that a man might have to answer with his life for consequences which he neither intended nor foresaw.' *Com. v. Pierce,* 138 Mass. 165, 178, 52 Am. Crim. Rep. 264, 5 Am. Crim. Rep. 391; *Com. v. Chance,* 174 Mass. 245, 252, 75 Am. St. Rep. 306, 54 N. E. 551. 'The criterion in such cases is to examine whether common social duty would, under the circumstances, have suggested a more circumspect conduct.' 1 East, P. C. 262. If a man should kill another by driving an automobile furiously into a crowd, he might be convicted of murder, however little he expected the result. See *Reg. v. Desmond,* and other illustrations in Stephens' Dig. Crim. Law, art 223, 1st ed., p. 146. If he did no more than drive negligently through a street, he might get off with manslaughter or less. *Reg. v. Swindall,* 2 Carr. & K. 230, 2 Cox, C. C. 141; *Rex v. Burton,* 1 Strange, 481. And in the last case he might be held although he himself thought that he was acting as a prudent man should. See the *Germanic Oceanic Steam Nav. Co. v. Aitken,* 196 U. S. 589, 596. But without further argument, the case is very nearly disposed of by *Waters-Pierce Oil Co. v. Texas,* 212 U. S. 86, 109, where Mr. Justice Brewer's decision

and other similar ones were cited in vain. *We are of the opinion that there is no constitutional difficulty in the way of enforcing the criminal part of the act.*"

In accordance with the above reasoning, the first headnote summarizes the ruling as to this point in the following succinct language:

* * *

HEADNOTE OF NASH CASE

1. "There is no such vagueness in the Anti-trust Act of July 2, 1890, as to render it inoperative on its criminal side, because only such contracts and combinations are within the act as, by reason of intent, or of the inherent nature of the contemplated acts, prejudice the public interests by unduly restricting competition, or unduly obstructing the course of trade."

GEORGIA STATUTE MORE DEFINITE THAN CALIFORNIA SEDITION STATUTE UPHELD AGAINST CLAIM OF VAGUENESS

The Georgia statute now being considered is more definite and certain than was the California statute under which Miss Whitney was convicted, and which was sustained in *Whitney v. California*, 274 U. S. 357, 368, against the contention that the California statute was "repugnant to the due process clause by reason of vagueness and uncertainty." The decision recites that she was convicted under Sec. 2, Subd. 4, which was as follows:

"Any person who . . . (4) organizes or assists in organizing, or is or knowingly becomes a member of, any organization, society, group or assemblage of persons organized or assembled to advocate, teach or aid and abet criminal syndicalism, is guilty of a felony."

And criminal syndicalism was defined in the Act as:

"Any doctrine or precept advocating, teaching or aiding and abetting the commission of crime, sabotage

(which word is hereby defined as meaning wilful and malicious physical damage or injury to physical property), or other unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change."

One might ask (paraphrasing appellant's argument) *"when must the accused intend* that the change in industrial ownership or control must take place, when he acts as an 'organizer' or member of a group or society advocating force and violence to accomplish such change?" The California statute does not answer this question. It might just as logically be contended, therefore (as it is contended in the present case), that the above California statute violates the "due process" clause of the Fourteenth Amendment to the U. S. Constitution because of vagueness and uncertainty.

But the *Whitney* decision held that the California statute was *not* unconstitutional or void for vagueness or uncertainty. The headnote (No. 5) summarizes the ruling upon this point as follows:

"A statute defining the term 'criminal syndicalism' as any doctrine or precept advocating, teaching or aiding, abetting the commission of crime, sabotage, which is defined as meaning wilful and malicious physical damage or injury to physical property, or unlawful acts of force and violence, or unlawful methods of terrorism, *as a means of accomplishing a change in industrial ownership* or control or effecting any political change, and providing punishment for anyone who organizes or becomes a member of any organization to advocate, teach, or abet criminal syndicalism, *is not so vague and uncertain as to violate the due process clause of the Federal Constitution.*"

The decision in above case, on p. 369, cites and follows the principle which the United States Supreme Court had already ruled in the *NASH* case (supra) (dealing with the Anti-Trust

Act in its criminal side), the *FOX* case (supra) (sustaining the Washington statute against the contention of vagueness), and cites several others which we will here list:

Miller v. Strahl, 239 U. S. 426, 434.
State v. Hennessy, 114 Wash. 351, 364, 195 Pac. 211.
State v. Laundy, 103 Or. 443, 460, 204 Pac. 958 (14).
Peo v. Ruthenberg, 229 Mich. 315, 325, 201 N. W. 358.
Peo v. Steelik, 187 Cal. 361, 372, 203 Pac. 79.
Peo v. Lloyd, 304 Ill. 23, 34, 136 N. E. 505.

On page 368 the *Whitney* decision points out that the criminal syndicalism statute of California then under attack "has no substantial resemblance to the statutes held void for uncertainty under the Fourteenth and Fifth Amendments in the cases of *International Harvester Co. v. Kentucky*, 234 U. S. 216, 221, and *United States v. L. Cohen Grocery Co.*, 255 U. S. 81, 89, because of not fixing an ascertainable standard of guilt. These two cases, thus distinguished, are cited and relied upon by appellant on pages 49 and 50 of his brief.

THE LIMITATION PLACED UPON THE TIME-ELEMENT OF THE INTENT IS IN DEFENDANT'S FAVOR

It will be noticed that the alleged indefiniteness of which appellant complains in the Georgia statute as construed is *not an indefiniteness of any act* but is merely an alleged indefiniteness in the time-element of the *intent* required to make the act penal.

In order to point out or accentuate the unreasonableness of appellant's contention that Section 56 is void for vagueness, we will present an analogy from the law of "intent" in bribery. Giving or offering to give a reward to an official, with *intent to influence his official behavior*, is of course bribery. Such intent is a necessary element in all bribery statutes that have come to our attention. But many well-considered decisions have held that the "official behavior"

which accused intends to influence need not be in a matter *then* pending, and need not even be in a matter then known to the parties, but may be in such matters as may arise in the scope of the official's duties from time to time. For instance, the Supreme Court of Massachusetts held in *Comm. v. Lapham*, 156 Mass. 480, 31 N. E. 638 (2):

> "It is not necessary that the indictment (for bribery) aver that the corrupt intention to influence the act or judgment of the inspector was in relation to any specific matter then pending before him; it is enough to aver a corrupt intention so to influence him in any matter pending before him, *or which may by law come or be brought before him.*"

Now suppose it were contended by someone that the above Massachusetts law had no limit as to the time-element involved in the intent to influence official behavor, and suppose the Massachusetts Supreme Court should answer:

> This statute does not mean that there is no limit whatever as to when the official's conduct was to be influenced, but as to this element it would be sufficient if the accused intended that it shuld happen *at any time within which he might reasonably expect his influence to continue to be directly operative* in causing such action by the official whom he sought to influence."

This limitation upon the time-element involved in the intent would be *in the defendant's favor*, and would be a perfectly reasonable limitation to place. It would be applying the "rule of reason" which the Supreme Court of the United States applied in the *Standard Oil Company* case and the *Nash* case, supra, and which the Georgia Supreme Court applied in the *Herndon* case in construing Section 56.

Criminal law is replete with statutes requiring certain "intent" as a necessary element of the crime, and they usually place no time limit as to *when* the accused must intend that the result be accomplished. For instance, see all the forgery statutes containing "with intent to defraud," etc. As to all

of these it would be reasonable and proper for the Courts to declare that the intent involved is an intent to accomplish the desired result within such time as the accused might *reasonably* expect his influence or his act to be directly operative in producing the result which he desires.

STATUTE PRESUMED TO BE CONSTITUTIONAL, AND NOTHING IS PRESENTED AGAINST SEC. 56 SUFFICIENT TO OVERCOME THIS PRESUMPTION

This Court has often expressed itself as to the strength of the presumption of constitutionality of a statute. Chief Justice Marshall said that before an act of the law-making power should be set aside as unconstitutional, "the opposition between the law and the constitution should be such that the judge feels a clear and strong conviction of their incompatibility with each other." *Fletcher v. Peck*, 6 Cranch, 128.

In the *"Sinking Fund cases,"* 99 U. S. 700, 718, the court said:

> "Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt."

Justice Holmes said, in *Missouri, Kansas & Texas Ry. v. May*, 194 U. S. 267, 270, in discussing a contention that a Texas statute imposing a certain penalty upon railroads was violative of the "due process of law" clause of the U. S. constitution,

> "Great constitutional provisions must be administered with caution. Some play must be allowed for the joints of the machine, and it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts."

Appellant concedes this principle in part, in his brief. On page 42 thereof he refers to the presumption of constitutionality, but says that "this presumption is that the facts are such that the legislation is reasonable and it may be rebutted

by showing that the facts are otherwise." We contend that there is no sufficient "showing" in this case to overcome this presumption of constitutionality, and that the judgment of the Supreme Court of Georgia in this habeas corpus case should therefore be sustained.

The closing request of appellant in his brief is that his bail be cancelled. We therefore ask that it be not cancelled but that it be allowed to stand as a valid and enforceable bond.

Respectfully submitted,

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Atlanta, Georgia,

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